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Supreme Court, U.S.
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IN THE
# Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,
*Petitioners,*

v.

JAMES DALE,
*Respondent.*

**On Writ of *Certiorari* to the Supreme Court of New Jersey**

## BRIEF OF FAMILY RESEARCH COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS*

**Family Research Council, Inc. (hereinafter "FRC")** is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice on the unique relationship between parents and their children. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. The issues in this case directly affect the physical, psychological and emotional well being of more than 4 million boys throughout the United States enrolled in the Boy Scouts of America. **(FRC)** has particular knowledge about issues of child safety that will be helpful to the Court in this case.[1]

## SUMMARY OF ARGUMENT

The decision by the New Jersey Supreme Court declaring the Boy Scouts of America (hereinafter "BSA") to be a public accommodation under the New Jersey Law Against Discrimination (hereinafter "LAD") and requiring them to accept homosexuals as leaders and members violates the BSA's fundamental rights of speech, expressive

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[1] In accordance with Rule 37 of the Rules of this Court, the *amicus curiae* submit this brief in support of petitioner. All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. Counsel for *amicus curiae* authored this brief in its entirety, and no other person or entity, besides *amicus curiae*, has made a monetary contribution to the preparation of this brief.

and intimate Association, under the United States Constitution. In addition, forcing the BSA to accept homosexuals as leaders and members will open the door to unidentified homosexual pedophiles providing them with greater opportunities to sexually abuse Scouts within the intimate relationship that exists between Scouts and Scout Masters.

By enrolling their boys in the BSA, parents and families engage in expressive association and speech by communicating to their boys the ethical and moral beliefs they want their boys to live up to. By enrolling their boys in the BSA, parents, as well as the BSA, communicate their ethical and moral beliefs to other boys, as well as to the schools and communities in which they live.

Boy Scout units are small, intimate groups that create close personal relationships in which the members agree to live by a set of shared values and beliefs. These relationships pass down the values of parents and Scout leaders to the next generation, a fundamental freedom protected by the right of intimate association. The LAD displaces that freedom unnecessarily; sexual orientation discrimination can be prohibited in public accommodations without forcing the Boy Scouts to accept members who refuse to live by their moral code.

The New Jersey Court erred in concluding that the BSA's exclusion of homosexuals is "invidious discrimination"[2] based on "unsupportable stereotypes."[3] The court's mischaracterizations likely flow from misinformation regarding homosexuals and child molestation.

A nationwide investigation of child molestation in the Boy Scouts from 1971 to 1991 revealed that more than 2,000 boys reported molestations by adult Scout leaders. (Note: The Scouts, who have 150,000 Scoutmasters and

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[2] *Dale v. BSA*, 734 A.2d 1196, 1227 (N.J. 1999).

[3] *Id.* at 1244.



assistant Scoutmasters, ban hundreds of men each year from scouting out of concern that they might abuse boys.)[4] The fiat by the court below will only add to these numbers, thus burdening the BSA's compelling responsibility to protect Scouts from risks of sexual abuse.

## ARGUMENT

### I. THE DECISION BY THE NEW JERSEY SUPREME COURT VIOLATES THE BSA'S FUNDAMENTAL RIGHTS OF SPEECH AND EXPRESSIVE ASSOCIATION UNDER THE FEDERAL CONSTITUTION.

#### A. Civil liberties can only flourish when the fundamental rights of speech and expressive association, such as the BSA is engaged in, are protected against governmental interference.

Associations such as the NAACP and the Southern Christian Leadership Conference, *because of their unfettered ability to combine*, made their mark on this nation in helping it to live up to its creed as they saw it and as society-at-large now sees it. Government intrusion into such associations, dictating or changing membership and the associational purpose, would not have allowed these associations to flourish or act in the manner required for their voices and impact to be heard and felt. For such reasons the courts have long-safeguarded the fundamental rights of expressive association and free speech inherent therein.[5]

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[4] Patrick Boyle, *Scout's Honor* 316 (1994).

[5] *See, e.g., N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958): "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an

The BSA is definitively the kind of association the long march of expressive associational rights was meant to protect. By enrolling their boys in the BSA, parents and families engage in expressive association and speech by communicating to their boys the ethical and moral beliefs by which they want their boys to abide. By enrolling their boys in the BSA, parents, as well Boy Scouts, communicate their ethical and moral beliefs to other boys. By enrolling their boys in the BSA, parents and boys communicate their ethical and moral beliefs to the schools and communities in which they live.

In an age of declining moral values and challenges to our youth to live in accordance with reliable standards of right and wrong, the BSA stands as an organization that serves and communicates such standards. While we may or may not be living in--and sending our children into a society of--a Kulturkampf,[6] we can all freely admit that our youth face distinct ethical challenges in society today. To varying degrees it was always thus, however, from its very inception, the BSA was founded to stand athwart such societal vicissitudes in order to teach, instill, and communicate unflagging standards of conduct.

The BSA grew out of a movement to instill "Victorian virtues" in young boys.[7] To this day, despite

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inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment...." *Id.* at 461; *See also, N.A.A.C.P. v. Button*, 371 U.S. 415 (1963): "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429. The *Button* Court also recognized that an association does not have to be a "political party" or engaged in politics to "make[] possible the distinctive contribution of a minority group to the ideas and beliefs of our society." *Id.* at 331.

[6] *See Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., Rehnquist, C.J., Thomas, J., dissenting).

[7] Heather MacDonald, *Why the Boy Scouts Work*, City J., (Winter, 2000), at 16.



social and legal attempts to change them, the BSA remains strong in the broken places of society:

> [S]couting is a brilliant method for infusing children with a set of values that can be especially hard to find.... The little details that fill each meeting constantly reinforce a code of conduct based on self-restraint...the essentials of civilized life....These details define a scout; they are part of his identity.[8]

The BSA is a critically important organization, communicating a message within and without, that deserves the same respect as any other association attempting to work with its members for self and societal improvement. The BSA may not be popular in the context of certain of society's values, it may not be popular because of the warp and woof for which it stands, but the history of our nation is often written by that which flouts modern convention. It is for this reason that the First Amendment right of expressional association is deemed fundamental by the courts. It is for this reason that the BSA has that right to be protected against attempts of governmental coercion to change it from within and use it for what government, not the BSA, believes it does and should stand for.

### B. The forced inclusion of a member into the BSA, against the BSA's beliefs and interests, as the BSA articulates those beliefs and interests, eliminates BSA's rights of speech and expressive association.

The associational rights cases decided in this Court between 1984 and 1988[9] dealt with clubs or organizations different in nature from the BSA but the dicta and

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[8] *Id.* at 20.

[9] *See New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Rotary Int'l. v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. Jaycees*, 468 U.S. 609 (1984).

distinctions therein foreshadowed the rights to be vindicated in the case at bar.

In *Roberts*, this Court upheld the Minnesota Human Rights Act against a challenge by the Junior Chamber of Commerce, which asserted that admission of women to the Chamber would impede the organization's mission.[10] *Roberts*, however, is as important for what it says as it is for what it held. While recognizing the right of expressive association, Justice Brennan, writing for the majority, wrote:

> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority....Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.[11]

In what can only be described as a ringing endorsement for the rights asserted here by the BSA, Justice Brennan continued:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire....Freedom of association therefore plainly presupposes a freedom not to associate.[12]

While the Court in *Roberts* found that admission of women to the Junior Chamber of Commerce would not alter the message of the Chamber, Justice O'Connor was moved to write a concurring opinion re-establishing the distinctions between commercial and other expressive First Amendment rights in the associational context: "[T]his case...accords

[10] *Roberts*, 468 U.S. at 631.
[11] *Id.* at 622.
[12] *Id.* at 623



insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment."[13]

In complete disregard for the plain meaning of Justice O'Connor's concurrence, the court below eviscerates the BSA's right to determine its own message and membership. As Justice O'Connor so aptly put it:

> Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice....[C]itizens, not the government, control the content of public discussion.[14]

However, the court below, in attempting to control the content of public discussion, held it is not enough for the Boy Scouts to determine what it stands for or to say what its message is; the court below knew better.

Justice O'Connor saw the danger of such courts when she wrote "Whether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it."[15] There is a great deal the BSA does not explicitly say it forbids but that it rationally should be allowed to--and in fact does--forbid because it has been understood from time immemorial that such things are forbidden under the rubric of ethical and moral values as the BSA defines those terms. If the court below is disheartened that the BSA does not hold itself out publicly as an expressive association on the issue of homosexuality, we wonder what it thinks of Justice O'Connor's wise words that "No association is likely ever to be exclusively engaged in expressive activities," and that "[P]rotected expression

[13] *Id.* at 632 (O'Connor, J., concurring).
[14] *Id.* at 633-634 (O'Connor, J., concurring).
[15] *Id.* at 633 (O'Connor, J., concurring).

may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service," and, finally, "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."[16]

Justice O'Connor reiterated these concerns in her concurrence in *New York State Club Association v. City of New York*.[17] There she stated:

> [T]here may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other common bond. The associational rights of such organizations must be respected.[18]

While not claiming any right to exclude based on race, religion, or ethnic background, the BSA is making that claim with respect to homosexuality. Homosexual members, especially those who articulate their membership in that lifestyle and head organizations dedicated to homosexual rights, as Dale did when he was ousted from the BSA,[19] threaten the very meaning of the BSA as it encourages such concepts as "morally straight," "values," and "strong character." These words may not mean what the New Jersey Supreme Court wants them to mean, but they clearly mean such to the BSA and the BSA has the right to instill these ethics.[20]

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[16] *Id.* at 636 (O'Connor, J., concurring).
[17] *New York State Club Ass'n*, 487 U.S. 1 (1988).
[18] *Id*, at 19 (O'Connor, J., concurring).
[19] *Dale*, 734 A.2d at 1204-1205.
[20] Indeed, it is not a stinted definition of such words as "values" and "morally straight" to think they forbid homosexual activity. There is a long-standing Natural Law tradition that uses those words interchangeably with objections to such things as homosexuality. *See, e.g.,* Janet E. Smith, "Thomas Aquinas on Homosexuality," 129 in *Homosexuality and American Public Life* (1999). *See also,* Harry V. Jaffa, *Homosexuality and Natural Law* (Claremont Institute, Center for the Study of Natural Law: www.claremont.org/publications/homosexuality.cfm) (visited February 19, 2000).



### C. The New Jersey Supreme Court erred in its analysis of whose First Amendment rights were at stake and in determining that the LAD served a compelling interest sufficient to over-ride the BSA's First Amendment rights.

In 1943, when this nation was at war with the Nazis and Imperial Japan and our every resource was dedicated to the outcome of that war,[21] a minority citizen named Barnette would not let his child salute the flag in school because it would have violated his deepest moral and religious beliefs.[22] In that time of great consternation and need of patriotic unity, this Court summoned the constitutional courage to support Barnette's right to dissent from the cultural climate. This Court reasoned that to compel a person to "utter what is not in his mind" violates our most basic constitutional precepts.[23] Barnette was free, through his symbolic action, and for his own reasons, to stand against the culture in which he lived. This Court stated: "Symbolism is a primitive but effective way of communicating ideas....A person gets from a symbol the meaning he puts into it...."[24]

We should not retreat from that lesson here and we must equally admit that just as refusing to salute the flag is the communication of an idea, like the wearing of an

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[21] The generation forged during this time is now known as "The Greatest Generation." *See* Tom Brokaw, *The Greatest Generation*, (1998).
[22] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-630 (1943).
[23] *Id.* at 634.
[24] *Id.* at 632-633.

armband[25] is the communication of an idea, so too is donning the BSA uniform and joining the BSA the communication of a set of ideas. Just as Barnette could not be mandated to "utter what is not in his mind," so too should the BSA not be compelled to utter what is not in theirs.

Dale's co-presidency of the Rutgers University Lesbian/Gay Alliance and his spoken words, which landed him and a picture of him in the *Star-Ledger* newspaper,[26] coupled with his membership in the BSA, as a homosexual, alters the message the BSA communicates both to its boys within and to the community without. Justice Handler, in his concurrence below, melded his hand on this point when he wrote:

> The significance of the connection between identity and expression in respect of sexual orientation has been similarly recognized by New Jersey's Legislature....A prime example of self-identifying speech is the language of "coming out," that is, publicly acknowledging one's self as lesbian or gay. Dale's acknowledgment of his homosexuality, therefore, constitutes self-identifying speech....[27]

Justice Brennan made the same point: "The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that [public policy regarding homosexual rights] debate."[28] Justice Brennan continued by saying "[P]etitioner's 'speech'...is better evaluated as no more than a natural consequence of her sexual orientation....[I]t is realistically impossible to separate her spoken statements from her status."[29] Dale's speech can thusly be seen in two ways: his leadership role in the

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[25] *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).
[26] *Dale*, 734 A.2d at 1204-1205.
[27] *Id.*, at 1239. (Handler, J., concurring).
[28] *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1012 (1985) (Brennan, Marshall, JJ., dissenting).
[29] *Id.* at 1017 (Brennan, Marshall, JJ., dissenting).



Lesbian/Gay Alliance along with his statements to the press, on the one hand, and his status as described by Justice Handler below and Justices Brennan and Marshall in this Court, on the other.

Framed in this manner, the BSA's rights become all the more salient. Just five years ago, this Court unanimously ruled in favor of a parade, deemed to be a public accommodation, upholding its right to exclude a message of homosexuality under the First Amendment.[30] In *Hurley*, an Irish heritage parade (represented by Mr. Hurley), seeking to keep a homosexual rights organization out of its march, was challenged under the Massachusetts public accommodations law and Hurley's First Amendment rights were vindicated. Throughout *Hurley*, this Court stated the case for the First Amendment over and against the claims of the public accommodations law in a manner that also seems to have foreshadowed the case at bar.

Where the court below reasoned that the BSA's open invitation to society to join the BSA required it to rescind Dale's ouster,[31] and where the court below reasoned that the size of the BSA implies an open membership not discriminatory of message,[32] Justice Souter writing for this Court stated: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech "[33] Where the court below found that the BSA includes sponsors and members who subscribe to different views,[34]this Court stated: "[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a

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[30] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).
[31] *Dale*, 734 A.2d at 1211.
[32] *Id.* at 1216.
[33] *Hurley*, 515 U.S. at 569-570.
[34] *Dale*, 734 A.2d at 1223.

private speaker to shape its expression by speaking on one subject while remaining silent on another,"[35] and "[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[36]

It is clear beyond peradventure what this Court unanimously re-established in *Hurley*. Even though the Irish heritage parade had many voices, indeed, no seeming rhyme or reason to its voices as viewed by outsiders, "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[37] Furthermore, this Court maintained:

> [A] speaker has the autonomy to choose the content of his own message.[38] [W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.[39] While the law is free to promote all sorts of conduct..., it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.[40]

Comparing *Hurley* to *New York State Club Assn, supra*, the *Hurley* Court maintained:

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[35] *Hurley*, 515 U.S. at 574.
[36] *Id.* at 575.
[37] *Id.* at 574. (internal citations omitted).
[38] *Id.* at 573.
[39] *Id.* at 576. This view has been held relevant in other contexts as well. For example, in trademark law, this Court has affirmed that "[O]ne injury to a trademark owner may be 'the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name' by nonconfusing uses." *San Francisco Arts & Athletics, Inc., v. U.S. Olympic Comm.*, 483 U.S. 522, 539 (1987) (internal citations omitted).
[40] *Hurley*, 515 U.S. at 579.



> GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.[41]

Furthermore, it is the right of the group to define its own message.[42] The *Hurley* Court could not have been more clear. "[T]he Constitution looks beyond written or spoken words as mediums of expression"[43] and such mediums, as the BSA, enjoy the fundamental rights guaranteed by the First Amendment.

Nonetheless, the court below attempted to whittle away the BSA's message by bootstrapping Dale's LAD claim to the concept of a compelling state interest, aimed at eliminating discrimination, that would over-ride the BSA's fundamental First Amendment rights.[44] While agreeing that there is a compelling state interest in eliminating certain forms of discrimination, this Court has never held, either in the due process or equal protection contexts, that there is either a fundamental right to homosexual conduct or that homosexual rights should be analyzed with anything greater than a rational basis test.[45] While it is true that fundamental rights, such as those asserted here, can in some cases be infringed by compelling state interests,[46] the *Hurley*

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[41] *Id.* at 581.
[42] The California Supreme Court, in Judge Kennard's concurrence, noted this in its Boy Scouts case when Judge Kennard wrote "[W]hen an individual seeks to use state power to force a private organization to accept that individual as a member...the First Amendment rights at issue are those of the organizations and its members, not those of the applicant." *Curran v. Mount Diablo Council of the B.S.A.*, 952 P.2d 218, 256, n.1. (Cal. 1998). (Kennard, J., concurring).
[43] *Hurley*, 515 U.S. at 569.
[44] *Dale*, 734 A.2d at 1227.
[45] *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (no fundamental right to homosexual conduct); *Romer*, 517 U.S. 620 (rational basis/relationship test used in analyzing amendment affecting homosexual rights).
[46] *Roberts*, 468 U.S. at 623.

Court, in analyzing the Massachusetts public accommodations law (which is similar to the New Jersey LAD), refused to ratchet up the Massachusetts protections to the level of a compelling interest that would vitiate Hurley's First Amendment rights.[47]

In sum, in an age when we laugh and mock what we used to honor and venerate, the BSA stands against a cultural tide that may or may not have lasting consequences but that the BSA nevertheless opposes in speech, association, and training. The BSA has a fundamental right to function according to its dictates and not those of a court that would redefine who they are. If the New Jersey Supreme Court's decision stands, the precedent will have been set that any group or voluntary association legally functioning in this society will be on notice that it can no longer determine its own code of ethics and interpret its own code of morality--the state and courts will know better. Should that precedent be established, the First Amendment will have been reduced to a shadow of itself, if not an absurdity, and we all, including those in favor of the BSA's position and those opposed, will be diminished.

## II. THE FUNDAMENTAL FREEDOM OF INTIMATE ASSOCIATION PROTECTS RELATIONSHIPS AMONG BOY SCOUTS.

### A. An intimate association exists among Scoutmasters, Scouts and their parents.

This Court has established that certain types of personal relationships are protected from unjustified interference by the State under the freedom of intimate association.[48] In *Roberts v. Jaycees*, this Court enunciated several factors to be considered in evaluating the intimacy of

[47] *Hurley*, 515 U.S. at 571-572, 577-578.
[48] *Roberts*, 468 U.S. 609, 618 (1984).



an association, including size, purpose, selectivity, congeniality, and seclusion from others in critical aspects of the relationship.[49] This Court looked at the local level of the Jaycees and held they were too large and unselective to qualify for protection. The local chapters examined reached 400 members or more, and they had never refused membership to any male within the age requirements.[50] Women and other nonmembers were included in many Jaycees activities.[51]

#### 1. Size and congeniality matter.

In contrast, the typical local Scout gathering is small. "Scouting units are small, intimate groups."[52] Most activity is centered in the "Patrol," a group of five to eight boys engaging in supervised interpersonal interaction,[53] typically in a private home,[54] meeting once a week.[55] The "Troop" is comprised of three or four Patrols (about 30 boys) and headed by a Scoutmaster.[56] The Troop meets once a month.[57] The Patrol is composed of a Scout's closest friends in the Troop.[58] "Patrol solidarity is strongly encouraged through the adoption of Patrol names and Patrol calls . . . . Each Patrol has its own flag, emblem, boy leader, meetings, camping trips, and during Troop meetings, the Patrols

[49] *Id.* at 620.
[50] *Id.*
[51] *Id.* at 621
[52] Boy Scouts of America, *The Official Scoutmaster Handbook* 139 (1998).
[53] *Welsh v. BSA*, 993 F.2d 1267, 1272 (7th Cir. 1993); *Yeaw v. BSA*, 64 Cal. Rptr. 2d 85, 87 (Cal. Ct. App.1997); Paul Varela, Note, *A Scout is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 Wm. & Mary L. Rev. 919, 939 (1989).
[54] *Welsh*, 993 F.2d at 1272.
[55] *Yeaw*, 64 Cal. Rptr. at 92.
[56] Varela, *supra* note 53, at 939.
[57] *Yeaw*, 64 Cal. Rptr. at 92.
[58] *Id.*

compete against each other in various games and contests."[59] A "sense of belonging is reinforced by the Scout uniform and the reminder that all Scouts have accepted a system of shared values and beliefs."[60] "The relationships in scouting are continuous, personal and social . . . ."[61] Scoutmasters are instructed to develop close personal relationships with every boy in the Troop.[62] The Scoutmaster is a role model for the Scout; he serves to impress upon the Scout the BSA's vision of morality and appropriate gender behavior. According to the *Official Scoutmaster Handbook*: "The Scouts . . . look up to you for guidance on a number of levels, many of them unspoken. The way you treat others, provide leadership, and act . . . will influence Scouts' actions."[63]

Scoutmasters give Scouts advice on moral and social issues normally confined to a parent-child relationship, including friendship, personal safety, using judgment, racism, peer pressure, sexual abuse, and sexual responsibility.[64] This can only be achieved through a high level of intimacy and trust. Far from being silent on the subject of sexual behavior, as suggested by the New Jersey Supreme Court, the Boy Scouts take definite and consistent stands on sexual morality and homosexuality.[65] Scoutmasters are trained to inform Scouts that homosexuality is not "morally straight" and therefore incompatible with the Boy Scout Oath.[66] Scoutmasters are instructed to answer questions or provide advice on sexual matters and family life when requested.[67] The Boy Scout

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[59] *Scoutmaster Handbook, supra* note 52, at 20-2.
[60] *Yeaw*, 64 Cal. Rptr. at 92.
[61] *Id.*
[62] *Scoutmaster Handbook, supra* note 52, at 3, 9,120-29, 138. Varela, *supra* note 53, at 942.
[63] *Scoutmaster Handbook, supra* note 52, at 3.
[64] Boy Scouts of America, *The Boy Scout Handbook* 331-81 (11th Ed. 1998).
[65] *Curran*, 952 P.2d 218, 225 (1998).
[66] *Id.* at 226 n.8.
[67] *Id.* at 226 n.9.



Handbook advises boys to remain abstinent until marriage and encourages boys to ask a Scoutmaster if they have questions about "growing up, about relationships, or about sex...."[68]

The closeness of this relationship and the care entrusted to the Scoutmaster has been considered an aggravating factor justifying increased sentences in cases of molestation,[69] and justification for releasing records of child abusers to the Boy Scouts.[70]

2. Selectivity matters.

The Scouts limit their membership to boys between the ages of 11-17 who intend to adopt the organization's shared beliefs and values by promising to live by the Scout Oath, Law, Motto, Slogan, and the Outdoor Code.

> Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without the exercise of sound discretion and judgment. This is evident from the [Boy Scout] Constitution and By-laws as well as the Boy Scouts' Oath and Scout Law. The Oath represents the commitment of each member.... [T]he Scouts organization is not only selective, but [] its very Constitution, By-laws and doctrine dictate that it remain selective."[71]

The Scouts believe without these qualifications the purpose of Scouting cannot be achieved, and have spent thousands

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[68] *Boy Scout Handbook, supra* note 64 at 377.
[69] *Washington v. P.B.T.*, 67 Wash. App. 292 (Wash. Ct. App. 1992) ("[T]he appellant's position as senior patrol leader indicates that he enjoyed a position of trust with his victim ....").
[70] *W.P. v. Poritz*, 931 F. Supp. 1199, 1212 (D.N.J. 1996), *rev'd* on other grounds, *sub nom E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Oregon v. Burke*, 818 P. 2d 511, 517 (Or. Ct. App. 1991).
[71] *Welsh*, 993 F.2d at 1276-77.

of dollars in court battles to protect the selectivity of their membership.[72]

The New Jersey Supreme Court held in *Dale* that the requirement of adhering to the Scout Oath and Law is not a practical barrier to membership, when in fact the Scouts have disqualified boys and men from participation due to failure to live by the Oath. In *Welsh v. BSA* and *Randall v. Orange County Council*, the Scouts excluded from membership boys who refused to swear to do their duty to God, as required by the Cub Scout Promise, the version of the Scout Oath recited by Cub Scouts.[73] The Boy Scouts also refuse membership to those men who profess homosexuality because that behavior is inconsistent with the Oath's requirement that a Scout be "morally straight" and the Scout Law's requirement that a boy keep himself "clean."[74] "The [BSA] as an organization have taken a consistent position that homosexuality is immoral and incompatible with the Boy Scout Oath and Law."[75] New Scouts are informed at their first meeting with the Scoutmaster that "the Scout Oath and Law are not just to be memorized but are to be used as guidelines for living."[76]

In addition, because the beliefs and values of Scouting are well known, parents who find those values inconsistent with their own are unlikely to place their son in Scouting, thus any paucity of cases in this area arises from the fact that those unwilling to adopt the beliefs of the Scout Oath and Law do not apply for membership.

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[72] *Id.*; *Curran*, 952 P.2d 218 (Cal. 1998); *Randall v. Orange County Council*, 952 P.2d 261 (Cal. 1998); *Yeaw*, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997); *Quinnipac Council v. Comm. on Human Rights*, 528 A.2d 352 (Conn. 1987); *Seabourn v. Coronado Area Council*, 891 P.2d 385 (Kan. 1995); *Dale*, 734 A.2d 1196; *Schwenk v. BSA*, 551 P.2d 465 (Or. 1976).

[73] *Welsh*, 993 F.2d at 1268, *Randall*, 952 P.2d at 263.

[74] *Curran*, 952 P.2d at 225.

[75] *Id.* (quoting the trial court's decision).

[76] *Scoutmaster Handbook, supra* note 52, at 138.



Potential Scoutmasters are subject to even stricter membership requirements. In addition to the Scout Oath and Law, adult members are bound by the Declaration of Religious Principal and are subject to evaluation by the local council according to criteria designed to "select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values."[77] An "old boy" Scout network often identifies potential Scoutmasters; these names are forwarded to a committee of Scout leaders who contact potential volunteers.[78] The vetting of candidates is necessary because the Scoutmaster is a role model to the Scout; the Scout is encouraged to imitate the Scoutmaster and seek his advice on personal matters.

3. Purpose matters.

The Boy Scouts are unlike the previous associations that this Court has evaluated for intimate association; the Jaycees and Rotary Club are organizations that foster business and commercial connections.[79] "The mission of the [BSA] is to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and Law."[80] Though many of the activities participated in are recreational or social, every Scout activity strives toward the three aims of Boy Scouting: building character, fostering citizenship, and developing mental, moral, and physical fitness.[81] "Scout programs are designed to reinforce a sense of shared values and beliefs, group identification, belonging, unity and camaraderie."[82] A parent's choice to enroll their son in Scouting is analogous to

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[77] *Dale*, 734 A.2d at 1216-17.

[78] Varela, *supra* note 53, at 941.

[79] *Roberts*, 468 U.S. at 616, 626; *Rotary Club*, 481 U.S. at 549.

[80] *Scoutmaster Handbook, supra* note 52, at 10.

[81] *Id.* at 7.

[82] *Yeaw*, 64 Cal. Rptr. at 92.

the parent's right of control over the education of their child and right to impart their own values to their children, both protected as fundamental freedoms.[83]

4. The exclusion of outsiders from critical aspects of the relationship matters.

Boy Scout planning, decision-making, and activity takes place mostly away from public view and nonmembers have no role in decision-making nor do they participate in activities as members would.[84] Most Boy Scout interaction takes place at the Patrol level, away from public view. The members lead, plan, and organize their own activities, without the input of nonmembers.[85] At the Troop level, visitors are allowed to attend meetings if they are not disruptive to the proceedings,[86] but they do not participate as members of the Scouts. Unlike the Jaycees, individuals who do not qualify for membership are not permitted to participate on a junior or associate level.

**B. New Jersey is not justified in infringing on the Boy Scouts' freedom of intimate association.**

Determining the limits of state authority over a private association "unavoidably entails a careful assessment of where the relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[87] Along that spectrum, the relationship between Scout and Scoutmaster closely resembles a family relationship. The

[83] *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[84] *Welsh*, 787 F. Supp. at 1276-77; *Yeaw*, 64 Cal. Rptr. 2d at 92.
[85] *Welsh*, 787 F. Supp. at 1519-20.
[86] Varela, *supra* note 53, at 942.
[87] *Roberts*, 468 U.S. at 620.



relationship exemplifies the type of relationship meant to be protected: "personal bonds that have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs...."[88] Like the freedom of the parent to educate his child in his beliefs and in the manner of his choosing,[89] the relationships forged in Scouting enable parents and Scoutmasters to pass down their shared ideas and beliefs.

New Jersey's LAD significantly infringes on the Scouts' right of intimate association. The Scouts would be unable to carry out their purpose if the State required them to accept members who refuse to live by the code to which all are sworn to adhere. Forcing the Scouts to accept homosexuals as members would leave boys the option of attempting to form an intimate relationship with a leader who opposes the beliefs the Scout has sworn to uphold or to quit Scouting. In the case of Patrol meetings, the law would force parents who host meetings to accept into their *private home,* individuals who practice a behavior antithetical to theirs and the Scouts' moral beliefs.

Although New Jersey is free to extend public accommodation protection beyond the federal level, a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[90] New Jersey can prohibit sexual orientation discrimination in traditional public accommodations and professional or business associations without infringing on the right of intimate association.

## III. THE DECISION BY THE COURT BELOW IMPERMISSIBLY INTRUDES ON THE BSA's

[88] *Id.* at 618-19.
[89] *Moore v. City of East Cleveland*, 431 U.S. 454 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce*, 268 U.S. at 535; *Meyer*, 262 U.S. 390 (1923).
[90] *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

## ASSOCIATIONAL RIGHTS AND DUTY TO ENSURE THE GREATEST PROTECTION TO THE SCOUTS ENTRUSTED TO THEIR CARE.

### A. The New Jersey Court erred in concluding that the BSA's exclusion of homosexuals is "invidious discrimination"[91] based on "unsupportable stereotypes."[92]

The court's mischaracterizations likely flow from its misinformation regarding homosexuals and child molestation. Justice Handler's concurring opinion incorrectly concludes: "The myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished."[93]

*Amicus* is not asserting that Respondent is a pedophile, or that all homosexuals are pedophiles. It is undeniable, however, that many who are have used their position as Scout leaders to sexually abuse boys in their care. If the BSA is forced to include as members, men whose sexual preference is for other men, it is inevitable that more men whose sexual preference is for boys will enter through the same door.

A nationwide investigation of child molestation in the Boy Scouts from 1971 to 1991 revealed that more than 2,000 boys reported molestations by adult Scout leaders. (Note: The Scouts, who have 150,000 Scoutmasters and assistant Scoutmasters, ban hundreds of men each year from scouting out of concern that they might abuse boys.)[94] *See infra*, Section B. The fiat by the court below will only add to these numbers, thus burdening the BSA's compelling responsibility to protect Scouts from risks of sexual abuse.

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[91] *Dale*, 734 A.2d at 1227.
[92] *Id.* at 1244.
[93] *Id.* at 1243.
[94] Boyle, *supra* note 4, at 316.



Child psychologist, George A. Rekers, who specializes in the development of sexual orientation in children and adolescents, was called as an expert witness in a discrimination suit against the Boy Scouts under the District of Columbia Human Rights Act. Dr. Rekers testified that allowing openly gay men to be scoutmasters "would legitimize the value of homosexual behavior in the eyes of many of the Boy Scouts...There would be more homosexual conduct or behavior by the boys in such troops."[95]

The Gay Report, published by homosexual researchers Jay and Young in 1979, revealed that 73 percent of homosexuals surveyed had sex at some time with boys 16 to 19 years of age or younger.[96]

Although homosexuals account for less than two percent of the population, they constitute about a third of child molesters.[97] It is a common false assumption that a child molester who is married is, therefore, a heterosexual. Such assumptions have been made about married Scout leaders who have been banned from Scouting because of molestation charges. It should be understood that "Pedophiles sometimes marry for convenience or cover...and to gain access to children."[98] Further, as noted by the National Association for Research and Therapy of Homosexuality (NARTH), "since homosexual pedophiles victimize far more children than do heterosexual pedophiles, it is estimated that approximately 80 percent of pedophilic victims are boys who have been molested by

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[95] Tracy Thompson, *Scouting and New Terrain*, Washington Post Mag., August 2, 1998, at WO6.
[96] K. Jay and A. Young, *The Gay Report* 275 (1979).
[97] K. Freund and R.I. Watson, *The Proportions of Heterosexual and Homosexual Pedophiles Among Sex Offenders Against Children: An Exploratory Study*, J. of Sex & Marital Therapy 18 (1992). *See also*, K. Freund, and R.I. Watson, *Pedophilia and Heterosexuality vs. Homosexuality*, 10 J. of Sex & Marital Therapy 197 (1984).
[98] Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis*, National Center for Missing and Exploited Children 13 (2d Ed. 1987).

adult males."[99] "Teachers who practice homosexual acts are between 90 to 100 times more likely to involve themselves sexually with pupils than teachers who confine themselves to heterosexual acts."[100]

The *Journal of the American Medical Association* published an analysis of 166 studies between 1985 and 1997 of sexually abused boys. The analysis concluded that sexual abuse of boys often goes undetected and untreated. Sexually abused boys are at increased risk of post-traumatic stress disorder, major depression, anxiety disorders, paranoia, dissociation, somatization, bulimia, anger, aggressive behavior, poor self-image, poor school performance, running away from home, and legal trouble. "The perpetrators tend to be males who are known but frequently unrelated to the victims. The abuse typically occurs outside the home, is repeated and involves penetration."[101]

Kenneth V. Lanning, Supervisory Special Agent with the Behavioral Science Unit at the F.B.I. Academy writes: "In a recent study, Dr. Gene Abel found that two thirds of all victims molested outside the home were boys. Unlike intrafamilial sexual abuse, in which the most common reported victim is a young female, in child sex rings we are often dealing with the adolescent boy victim."[102] "As many as 66 percent or more of the victims in these cases are male. Most of these males are boys between the ages of 10 and 16."[103]

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[99] Thomas Schmidt, *Straight and Narrow? Compassion and Clarity in the Homosexuality Debate* 114 (1995).

[100] Paul Cameron, *Homosexual Molestation of Children*, 57 Psychol. Rep., 1227 (1985).

[101] American Medical Association, *Sexual Abuse of Male Children Common, Under-Recognized, Under-Treated* (Science News Update: www.ama-assn.org/sci-pubs/sci-news/1998/snr1202.htm)(visited Feb. 24, 1999)

[102] Kenneth V. Lanning, *Child Sex Rings: A Behavioral Analysis*, National Center for Missing and Exploited Children 10 (2d Ed. 1992).

[103] *Id.* at 11.



A study of Canadian pedophiles has shown that 30 percent of those studied admitted to having engaged in homosexual acts as adults, and 91 percent of the molesters of non-familial boys admitted to no lifetime sexual contact other than homosexual.[104]

In a 1985 study of the rates of molestation among homosexual pedophiles compared to heterosexual pedophiles, Dr. Paul Cameron found the following: 153 homosexual pedophiles had sexually molested 22,981 boys over an average period of 22 years. 224 heterosexual pedophiles had molested 4,435 girls over an average period of 18 years. The average homosexual pedophile molested an average of 150 boys, and each heterosexual pedophile molested an average of 20 girls, a ratio of 7.5 to one.[105]

Psychiatrist Jeffrey Satinover recognizes "This special issue [pedophilia] reflects the substantial, influential, and growing segment of the homosexual community that neither hides nor condemns pedophilia. Rather they argue that pedophilia is an acceptable aspect of sexuality, especially of homosexuality."[106]

The BSA has the constitutional right to determine its moral beliefs and to instill them in the Scouts parents have entrusted to their care. Moreover, BSA has a compelling duty to implement those beliefs in a manner that provides the greatest protection to the Scouts. The BSA's policy is not arbitrary "invidious discrimination." It is based on significant credible evidence that the intimate association that exists between Scouts and Scout leaders has been

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[104] W. L. Marshall, *et al., Early Onset and Deviant Sexuality in Child Molesters*, 6 J. of Interpersonal Violence 323-336 (1991): *cited in Pedophilia: The Part of Homosexuality They Don't Want You to See*, Colo. for Fam. Values Rep., 14 (March 1994).

[105] Cameron, *supra* note 101, at 1227-1236 (1985); *See* Gene Abel, *et al., Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 1 J. of Interpersonal Violence 16-17 (1987).

[106] Jeffrey Satinover, *Homosexuality and the Politics of Truth*, 63 (1996).

exploited by hundreds of homosexual pedophiles to sexually abuse thousands of boys.

### B. The intimate association that exists between the BSA Scout leaders and Scouts is a natural attraction to pedophiles seeking opportunities to sexually abuse boys.

The hundreds of sexual abuse lawsuits brought by Scouts against Scout leaders occurred within the intimate association that exists in scouting that sexual predators exploit as Scout leaders.[107] Other courts have recognized that the intimate association between Scout leaders and Scouts is the ideal type that homosexual pedophiles seek access to in order to sexually abuse boys.[108]

The overnight camping trips that are a core activity of Scouting provide the ideal situation for pedophiles to molest boys. "Most preferential child molesters usually work towards a situation in which the child has to change clothing, or spend the night or both. If the child molester achieves either of these two objectives, the success of the seduction is almost assured."[109] "Some offenders use an existing structure such as a scout troop, a sports team, or school club."[110]

> There are certain high-risk situations that arise in investigating historical child sex rings. Unfortunately, certain youth organizations inadvertently provide the child molester with almost everything necessary to operate a child sex ring. A scouting organization, for example, fulfills the sex

[107] *See Lourim v. Swensen and Cascade Pacific Council*, 977 P.2d 1157 (Or. 1999).
[108] *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (Tex. 1996); *Washington v. P.B.T.*, 67 Wash. App. 292 (Wash. Ct. App. 1992).
[109] Lanning, *supra* note 102, at 13.
[110] *Id.* at 14.



> ring offender's needs for: 1) access to children of a specific age or gender, 2) a bonding mechanism to ensure the cooperation and secrecy of victims, and 3) opportunities to spend the night with a victim or have a victim change clothing. The bonding mechanism of the scouts is especially useful to the offender. Loyalty to the leader and the group, competition among boys, a system of rewards and recognition, and indoctrination through oaths and rituals can all be used to control, manipulate, and motivate victims. Leaders in such organizations, especially those who are not the parents of children involved, should be carefully screened and closely monitored.[111]

In a 1999 case, *Doe v. Goff*,[112] the plaintiff alleged that he was sexually molested by his volunteer Scout leader and filed suit against Goff and the BSA for allowing Goff to participate in Scouting and for failure to implement child protection programs. The trial court granted summary judgment for the BSA, which was affirmed on appeal.

Judge Breslin's dissenting opinion in *Goff* cites the case record and stipulation by the parties regarding the frequency of child sexual abuse reports that have been filed by Scouts against Scout leaders:

> From the record we know that on an average of more than once a week for the past two decades, a Cub Scout, Boy Scout or Explorer Scout of the Boy Scouts of America (Boy Scouts) has reported being sexually abused by an adult leader. P. Boyle, *Scout's Honor*, Washington Times, May 20, 1991, at 7.
>
> The parties stipulated in this case that, between 1981 and 1988, 392 adult volunteer leaders were placed

[111] *Id.* at 16. *See also U.S. Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Child Pornography and Pedophilia*, 99th Cong., 1st Sess. 11-15 (1986) (Pedophiles will gravitate to Boy Scout leadership).
[112] 716 N.E.2d 323 (Ill. App. Ct. 1999).

on ineligible lists because of alleged sexual abuse of scouts. In 1988 alone, the Boy Scouts headquarters was notified of over one hundred allegations of molestation of troop members by adult leaders.

Furthermore, the record indicates that the Boy Scouts has taken steps to address sexual abuse of its scouts by: (1) publishing a pamphlet entitled Child Abuse: Let's talk about it and a booklet called How to protect your children from child abuse and drug abuse; and (2) producing and distributing a 90 minute videotape addressing sexual abuse and an educational video for scouts seeking help from being abused.[113]

Judge Breslin's analysis emphasizes the intimate association that exists between Scout leaders and Scouts that provides molesters with an ideal relationship and situation, which they exploit:

> Think about it. Each year thousands of young boys wave goodbye to mom and dad and go off to attend remote boy scout [sic] outings across the continent. Some of these expeditions last a week or more. There they are -- out in the wilderness -- no phone, no parents, no police, no teachers, none of the usual safety nets. Just the birds and the bears and the Boy Scout leaders. If that is not a description of taking custody so as to deprive one of normal opportunities of protection, I do not know what is.
>
> The Boy Scouts and its volunteers are responsible for the care and well-being of these vulnerable and impressionable children. In effect, they voluntarily step into the shoes of the parents. With such an undertaking should come the duty to act within reasonable means to protect scouts from sexual abuse by their adult leaders.[114]

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[113] *Id.* at 328.

[114] *Id.* at 329.



The *Washington Times* article cited by Judge Breslin lists "every case that the Washington Times found involving a Scout leader who was arrested or banned from Scouting for sexual abuse of Scouts."[115] There are 416 cases listed from 1971 through 1989.[116] Many of the cases involve multiple victims. Other courts have recognized that the intimate association between Scout leaders and Scouts is the ideal type that homosexual pedophiles seek access to in order to sexually abuse boys.[117]

Because so few pedophiles that molest boys are arrested, it is imperative that homosexuals are excluded from BSA membership in order to protect Scouts from potential abuse by homosexual pedophiles.

> Dr. Park Dietz, a psychiatrist specializing in forensics and child sex abuse, estimates that 10 percent of the men abusing boys are arrested. Dr. Gene Abel says that that relying on convictions or signed victim statements, such as the BSA demanded, 'would only include about five percent of the cases.'[118]

According to recent studies, child molesters average between thirty and sixty child victims before being caught and preferential child molesters [pedophiles] will sexually abuse an average of 380 children in their lifetime.[119] Unless

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[115] *Scout's Honor: The Abusers - State by State*, Wash. Times, May 20, 1991, at B6. In a California sexual abuse case, the BSA delivered "1871 Confidential Files" in response to a court order. Boyle, *supra* note 4, at 314.

[116] A search of the LEXIS federal and state database, using the search term "Boy Scouts and sexual abuse," identified another 42 cases from 1990 through the present involving sexual abuse of Scouts by Scout leaders. These do not include state trial court decisions where no appeal was taken.

[117] *Golden Spread Council*, 926 S.W.2d 287; *P.B.T.*, 67 Wash. App. 292.

[118] Boyle, *supra* note 4, at 63.

[119] Gene Abel, *Sexual Aggressive Behavior* (1986). *See, e.g.*, Abel, *supra* note 105, at 3, 21 (The number of offenses reported by "nonincarcerated child molesters ranged from 23.1 acts to 281.7 acts per offender").

the BSA learns that an applicant has a criminal record, he will not be excluded from membership. If the BSA is forced to admit homosexuals, homosexual pedophiles will be included. The BSA will not be able to exclude them until it is too late - after a Scout has been molested.

Although the Girl Scouts of America (GSA) now permits avowed lesbians to be members, it was the GSA's choice; no agency of government forced them to do so. Rightly or wrongly, most Scouting girls and their parents are not apprehensive about having women, whether heterosexual or homosexual, as GSA leaders in tents with young girls. At this time, there is little concern for abuse because reports of the numbers of women who molest girls are *de minimis*.

It would seem beyond cavil that the most inclusive interpretation a court could conceive of a public accommodation law, would not force the GSA to place men, whether heterosexual or homosexual, as leaders in overnight campouts with young girls. If the New Jersey Supreme Court's decision stands, the GSA will have no recourse if men demand entrance as leaders in the GSA.

The decision of the court below debases civil rights by reducing a noble body of law to an absurdity. Unless this Court reverses the decision, the constitutional rights of a private association and the health, safety and morals of Boy Scouts will be sacrificed on the altar of a civil right that belies its name.

## CONCLUSION

For all of the above reasons, your *amicus curiae* pray that this Honorable Court will reverse the judgment of the New Jersey Supreme Court and declare that the New Jersey Law Against Discrimination may not be applied to the Boy Scouts of America in violation of their rights under the United States Constitution.

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